IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1660

ABLE CONTRACTORS, INC.,

Petitioner,

-vs-

F. RAY MARSHALL, Secretary of Labor, U.S. Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Petitioner

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Petitioner, ABLE CONTRACTORS, INC., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case January 10, 1978.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit affirming the Judgment rendered by the United States District Court for the District of Montana, Billings, Division, has not yet been reported and is set forth in the Appendix, infra, at pp. 1a - 5a. The opinion of the United States District Court for the District of Montana, Billings Division is set forth in Appendix, infra pp 1b - 2b.

SUBJECT INDEX

TABLE OF AUTHORITITES CITED

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 10, 1978, and the petition for rehearing was denied on March 2, 1978. This Court has jurisdiction pursuant to Title 28 USC Section 1254(1).

QUESTIONS PRESENTED

1. Whether OSHA can enter a business premises and inspect to determine jurisdiction under Sec. 29 U.S.C. and Sec. 657(a)(1)(2) of the OSHA Act.

2. Whether the Circuit Court was correct in ruling that the Fourth Amendment issue was not raised in the United States District Court.

3. Whether OSHA can enter any business premises without a search warrant duly issued without probable cause to inspect for violations of the Act or to determine if the employer is subject to the Act.

UNCODIFIED ACTS, RULES AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF CASE

The Secretary of Labor, petitioned the United States District Court for the District of Montana for an Order allowing OSHA to inspect, pursuant to the Occupational Safety and Health Act of 1970, worksites and business premises of the petitioner. Petitoner filed a Motion to Dismiss alleging the petition did not state sufficient facts to allow such relief. The Secretary's petition alleged:

> "That as a result of such denial, the Secretary could not determine if (1) the respondent was subject to the Act, or (2) whether exempted from the Act, if otherwise subject to the Act, and (3) if respondent was subject to the Act, and not otherwise exempted, was respondent providing his employees a safe workplace, and otherwise complying with the standards."

At the hearing held on July 30, 1975, before the District Court, Mr. Barkley, the attorney for the Secretary, stated to the Court:

> "However, I think the germane issue is we do not know whether or not coverage extends to the respondent, because we have not made an inspection as of today. That would be the primary, or at least the threshold purpose of our inspection.

The District Court overruled Able's Motion to Dismiss and entered it's Order allowing OSHA to make the inspections

and in it's opinion stated:

> "The United States Supreme Court has provided constitutional safeguards to a property owner against governmental inspections. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967). But many courts have found that if inspections or seizure of records are within specific limits, i.e., inspection or examination during business hours and limiting inspection to specific subject matter, then there is no constitutional infringement. Brennan v. Buckeye Industries, Inc., 374 F.Supp. 1350 (1974); Terraciano v. Montanye, 493 F.2d 682 (2nd Cir. 1974). The United States Supreme Court has also provided that coverage by a Congressional Act, such as OSHA,need not be established prior to an examination or inspection. See Endicott-Johnson Corp. v. Perkins, 317 U.S. 501 (1943)."

The decision of the District Court was appealed to the Ninth Circuit Court and the Judgment of the District Court was affirmed. The Circuit Court in a lengthy opinion held in effect that OSHA could enter a business premises and make an inspection to determine if the employer was subject to the OSHA Act. Able could not refuse to allow such an inspection. Further, Able's remedy would be to subsequently contest the inspection in an

administrative forum because the application of exhaustion of remedies doctrine is applied to these circumstances. The Circuit Court also held Able raised for the first time on appeal the issue whether OSHA inspections are searches subject to the reasonableness requirement of the Fourth Amendment and for that reason refused to consider the issue.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S RULING THAT OSHA COULD ENTER THE WORK PLACES AND WORKSITES OF AN EMPLOYER TO DETERMINE WHETHER OR NOT THE EMPLOYER IS SUBJECT TO THE ACT IS ERRONOUS.

II.

THE CIRCUIT COURT'S HOLDING THAT THE PETITIONER MUST FIRST CHALLENGE THE INSPECTION IN THE ADMINISTRATIVE FORUM THE THE EXHAUSTION DOCTRINE APPLIES TO THE FACTS OF THIS CASE IS ERRONOUS.

III.

THAT THE CIRCUIT COURT'S HOLDING THAT THE ISSUE OF WARRANTLESS INSPECTIONS IN VIOLATION OF THE FOURTH AMENDMENT PROHIBITING UNLAWFUL SEARCH AND SEIZURES WAS NOT RAISED OR CONSIDERED BY THE LOWER COURT IS ERRONOUS.

IV.

THAT PETITIONER IS REQUIRED UNDER THE DISTRICT COURT'S ORDER TO GIVE UP THE RIGHT OF PRIVACY OR FIND ITSELF IN CONTEMPT OF COURT IF IN THE FUTURE REFUSES TO ALLOW INSPECTIONS ON ALL WORK PLACES AND WORKSITES.

STATEMENT

The 91st Congress passed legislation relating to the safety and health of workers employed by employers engaged in business affecting interstate commerce. This legislation was the Occupational Safety and Health Act of 1970 (OSHA), 29 USC §651, et seq. Although the purpose of the Act as delcared in Sec. 2, 29 U.S.C. §651(a) was to assure so far as possible every working man and women in the nation safe and healthful working conditions, it is limited in application to employers engaged in a business involving interstate commerce, OSHA Act §651(b)(3). The OSHA Act provides that OSHA has the right to physically enter and inspect the premises and job sites of an employer engaged in a business subject to the Act. The essential provisions of the Act provide in §657(a)(1)(2):

> "In order to carry out the purpose of this chapter, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized . . ."
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed

> by an <u>employee</u> of an employer." (Emphasis supplied).

In §652(5) of the Act the term employer is defined:

> "The term "employer" means a person engaged in a business affecting commerce who has employees . . ."

In §652(6) employee is defined as:

> "The term "employer" means a person engaged in a business affecting commerce who has employees. . ."

In §652(6) employee is defined as:

> "The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce."

However, Congress specifically stated in §651(b)(3) of the Act that "commerce" means <u>interstate commerce</u>. (Emphasis supplied).

The Circuit Court ruled the Fourth Amendment issue was raised the first time on appeal. Petitioner disagrees. Petitioner unsuccessfully argued to the District Court that Congress did not or could not give OSHA unlimited authority to physically enter a premises for the purpose of determining jurisdiction or to conduct an investigation. This is the reason petitioner maintained the Secretary was required to allege and prove jurisdiction in order to

obtain a mandatory injunction from the District Court. While this Fourth Amendment issue could have been approached with more precision, it is clear from the District Court's Memorandum it recognized and considered the Fourth Amendment issue and held that if OSHA inspections are within specific limits, i.e., inspection or examination during business hours and limiting inspection to specific subject matter, then there is no constitutional infringement, and, in effect, held that such inspections were not controlled by this Court's holdings in Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), which held in Camera, supra, that person has the constitutional right to insist that a search warrant be obtained before an administrative inspection of a private residence is allowed or as in See, supra, where their Court expanded the Camara holding to include commercial structures. The fact that Able is a corporation does not exempt it from the right of privacy. This Court held a corporation is entitled to protection for unlawful demands made in the name of a public investigation. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Charles E. Snyder

CHARLES E. SNYDER
1925 Central Avenue
Billings, Montana 59102
Attorney for Petitioner

DATED this 10th day of ~~April~~ May, 1978.

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
: ss.
County of Yellowstone)

I, CHARLES E. SNYDER, an attorney duly authorized to practice law in the State of Montana and the Courts of the United States of America, 1925 Central Avenue, Billings, Montana, attorney of record for ABLE CONTRACTORS, INC., Petitioner herein, depose and say that on the 10th day of ~~April~~ May, 1978, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit on the several parties thereto, as follows:

On the United States, by mailing copies in duly addressed envelopes, First Class, postage prepaid, to:

William J. Kilberg
Solicitor of Labor

Benjamin W. Mintz
Associate Solicitor for
Occupational Safety and Health

Michael H. Levin
Counsel for Appellate Litigation

U.S. DEPARTMENT OF LABOR
Washington, D.C. 20210

s/ Terence M. Swift
CHARLES E. SNYDER by
TERRENCE SWIFT, a member
of the firm.

SUBSCRIBED and SWORN to before me this 10th day of ~~April~~ May, 1978.

s/ Nadine C. Helzer
Notary Public for the
State of Montana.
Residing at Billings,
Montana. My commission
expires: 4-13-81

A P P E N D I X A

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. RAY MARSHALL, Secretary of
Labor, U.S. Department of Labor,

Petitioner-Appellee,

v.

No. 76-1615

ABLE CONTRACTORS, INC.,

Respondent-Appellant.

OPINION

Appeal from the United States
District Court for the District
of Montana

BEFORE: WRIGHT AND CHOY, Circuit Judges
and SWEIGERT, District Judge.*

PER CURIAM:

Able Contractors (Able) appeals from a district court order compelling it to submit to inspections under the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651, et seq.[1] The Secretary of Labor sought the injunction after Able on several occasions refused inspectors

*Senior District Judge, for the Northern District of California.

access to its premises and worksites.

The crux of Able's defense was that before inspections under §657 (a) can proceed the Secretary must prove that Able is an employer "engaged in a business affecting commerce," (§652(5)) and therefore subject to OSHA's coverage. Able argues that the Secretary must resort to a pre-inspection evidentiary hearing, utilizing his §657(b) subpoena powers when statutory coverage is in issue. It is also asserted that Congress would be exceeding its constitutional powers to authorize inspections without a prior showing of coverage under the Act.

Able's defense is without merit. Requiring such a hearing would totally frustrate OSHA's express objective of establishing a system of inspections executed without undue delay or advance notice. See §§657(a), 666(f). Furthermore, the Secretary's resort to his §657(b) powers is, by the statute's very terms, discretionary.

Moreover, it is hardly a novel proposition that an administrative agency can utilize its investigatory or subpoena powers and that a federal court can grant relief to aid it in doing so without a prior conclusive showing of statutory coverage. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Endicott-Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431 (9th Cir. 1975).

Generally the agency should make the initial determination of its own jurisdiction. State of Cal. ex rel. Christensen v. F.T.C., 549 F.2d 1321 (9th Cir. 1977). Primary jurisdiction to determine questions of OSHA coverage is lodged in the statutorily created organ for hearing appeals of OSHA violation citations, the Occupational Safety and Health Review Commission. Matter of Restland Memorial Park, 540 F.2d 626 (3rd Cir. 1976). Able should raise the question of statutory coverage in an administrative appeal contesting the validity of any citation it may receive as a result of OSHA inspections.

Before a federal court reviews the question of OSHA jurisdiction, sound judicial policy requires that Able exhaust its administrative remedies. Parisi v. Davidson 405 U.S. 34 (1972); State of Cal. ex rel. Christensen v. F.T.C., supra; Am. Fed. of Gov't Employees, Local 1668 v. Dunn, 561 F.2d 1310 (9th Cir. 1977). See also Lone Star Cement v. F.T.C., 339 F.2d 505 (9th Cir. 1964).

Application of the exhaustion of remedies doctrine is appropriate here. Able would not be exposed to irreparable injury by a requirement that it first contest in an administrative forum whether it is within OSHA's reach. There appears to be little doubt about jurisdiction, 2/ and the administrative agency is particularly competent to consider the question of statutory coverage. State of California ex rel. Christensen v. F.T.C., supra; Lone Star Cement Corp. v. F.T.C., supra, 339 F.2d at 510 citing 3 K. Davis, Administrative Law Treatise § 20.03 (1958 ed.).

Able raises for the first time on appeal the issue whether OSHA inspections are searches subject to the reasonableness requirements of the Fourth Amendment. Specifically it argues that the Secretary's inspectors must first obtain a search warrant on probable cause before they can demand access to Able's premises.

At no point in the proceedings below was the Fourth Amendment issue raised. Able's sole objection to the inspections, until it drafted its brief for this appeal, was that it had not been proven to be an employer affecting commerce prior to the attempts to compel obedience to the statute. Because it never raised the issue below, we hold that its Fourth Amendment claim was not timely asserted and was waived for purposes of this appeal. Usery v. Godfrey Brake & Supply Service, 545 F.2d 52 (8th Cir. 1976). Accordingly, we do not address the search and seizure issue.

The judgment of the district court is affirmed.

F O O T N O T E S

1/ All references to statutory sections, unless otherwise noted, are to Title 29, United States Code.

2/ We have previously recognized that when Congress enacted OSHA it intended to exercise its commerce clause powers to the fullest extent. Godwin v. Occupational Safety and Health Review Commission, 540 F.2d 1013, 1015 (9th Cir. 1976).

APPENDIX B

MEMORANDUM AND ORDER OF
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA,
BILLINGS DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JOHN T. DUNLOP, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

-vs- CV-75-57-BLG

ABLE CONTRACTORS, INC.,

Respondent.

MEMORANDUM AND ORDER

Presently pending in this action is a petition to allow inspection of defendant's worksites by the Occupational Safety and Health Administration.

The United States Supreme Court has provided constitutional safeguards to a property owner against governmental inspections. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967). But many courts have found that if inspections or seizure of records are within specific limits, i.e., inspection or examination during business hours and limiting inspection to specific

subject matter, then there is no constitutional infringement. Brennan v. Buckeye Industries, Inc., 374 F.Supp. 1350 (1974); Terraciano v. Montanye, 493 F.2d 682 (2nd Cir. 1974). The United States Supreme Court has also provided that coverage by a Congressional Act, such as OSHA, need not be established prior to an examination or inspection. See Endicott-Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

In view of the position that the United States Supreme Court and Circuit Courts have taken, this Court must grant OSHA'S petition.

This decision is regrettable; I find the Occupational Safety and Health Administration and its position in this case to be very distasteful.

IT IS ORDERED that the Occupational Safety and Health Administration may make inspections of Able Contractors, Inc., worksites but that such inspections be made at reasonable times in a reasonable manner and within reasonable limits pursuant to the provisions of the Act.

Done and dated this 15th day of December, 1975.

/s/ JAMES F. BATTIN
United States District
Judge